Yeap Nah Khe & Ors (suing as executors and trustees of the estate of Tye Kim Yuen, deceased) v Tye Cho Chun & Anor (sued as executors and trustees of the estate of Tye Kee Yoon @ Tai Hi Yoon)

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P–02–615 OF 1997
SHAIK DAUD, ABU MANSOR AND DENIS ONG JJCA
1 DECEMBER 1998

Civil Procedure *— Parties — Non-joinder of party — Application to obtain consent of court to sell property of estate — Widow of one beneficiary not made a party — Whether this was sufficient reason to relitigate issue of reserved price — Whether non-joinder had affected issue before court*

Civil Procedure *— Appeal — Abuse of process — Actual purpose of application was to relitigate issue of reserved price of property — Issue had been litigated earlier — Whether application was an abuse of process of court*

The executors and trustees of the estate of Tye Kee Yoon @ Tai Hi Yoon ('the first deceased') had issued Originating Summons No 24–642–88 to obtain consent of the court to sell the property of the estate. By then, one of the beneficiaries of the first deceased, Tai Kim Yuen ('the second deceased'), had died. With the consent of all parties, the court gave an order of sale of the said property at a reserved price of RM9.5m. After several attempts to auction the property failed, the court ordered the said property be sold by private treaty for RM9.5m. The defendants appeared to have agreed with the order as they did not appeal. One of the defendants later filed an application for the court to recall the order of sale for the purpose of enabling the court to consider an alternative valuation report. The court rejected the application and again there was no appeal. The sale was subsequently completed and proceeds of the sale were distributed to all beneficiaries except for shares of those who disagreed. Originating Summons No 24–580–1996 was later filed where the widow of the second deceased was named as the first plaintiff. The application was to seek a direction to institute proceedings against the defendants for damages for negligence and for breach of their fiduciary duties as executors and trustees of the estate. The application was dismissed. In this appeal, the issues that arose were that the widow of the second deceased was not made a party in Originating Summons No 24–642–88 and that valuers and brokers of the respondent might not have taken all relevant factors into consideration in the valuation of the said property resulting in the said property being grossly undervalued.

Held, dismissing the appeal:

The issue brought up by the appellants that the widow of the second deceased was not made a party in Originating Summons No 24–642–88 was not a reason to relitigate the issue of the reserved price. She was

A in fact not a beneficiary of the first deceased and she chose not to intervene as she had knowledge of the matter. In any case, by virtue of O 15 r 6(1) of the Rules of the High Court 1980, the non-joinder had not affected the issue before the court.

The actual purpose of the said application was to relitigate the B issue of the reserved price of the said property which issue had been litigated four years earlier. This was stated very clearly by the affidavit in support of the application. Therefore, this was an abuse of the process of the court (see pp 286I and 287A–B).

C **[Bahasa Malaysia summary**

Wasi-wasi dan pemegang-pemegang amanah harta pusaka Tye Kee Yoon @ Tai Hi Yoon ('si mati pertama') telah mengeluarkan Saman Pemula No 24–642–88 untuk mendapatkan kebenaran mahkamah bagi menjual harta pusaka tersebut. Pada masa itu, salah seorang daripada benefisiari si mati pertama, Tai Kim Yuen ('si mati kedua'), D telah mati. Dengan persetujuan semua pihak, mahkamah telah memberi satu perintah jualan terhadap harta tersebut pada harga rizab RM9.5 juta. Setelah beberapa percubaan untuk melelong harta tersebut gagal, mahkamah telah memerintahkan harta tersebut dijual melalui triti persendirian untuk RM9.5 juta. Defendan-defendan nampaknya telah bersetuju dengan perintah tersebut memnadangkan E tiada rayuan dibuat oleh mereka. Salah seorang daripada defendan-defendan tersebut kemudiannya telah memfailkan satu permohonan untuk mahkamah menarik kembali perintah penjualan itu dengan tujuan membolehkan mahkamah menimbangkan satu laporan penilaian alternatif. Mahkamah telah menolak permohonan tersebut F dan sekali lagi tiada rayuan dibuat. Penjualan telah kemudiannya dilaksanakan dan hasil penjualan tersebut telah dibahagikan kepada semua benefisiari-benefisiari kecuali bahagian-bahagian mereka yang tidak bersetuju. Saman Pemula No 24–580–1996 kemudiannya telah difailkan di mana balu kepada si mati kedua telah dinamakan sebagai plaintif pertama. Permohonan tersebut adalah untuk mendapatkan G satu arahan untuk memulakan prosiding-prosiding terhadap defendan-defendan untuk ganti rugi bagi kecuaian dan kemungkiran kewajipan fidusiari sebagai wasi-wasi dan pemegang-pemegang amanah harta pusaka tersebut. Permohonan tersebut telah ditolak. Di dalam rayuan ini, isu-isu yang telah timbul adalah bahawa balu kepada si mati kedua tersebut telah tidak dijadikan salah satu pihak di H dalam Saman Pemula No 24–642–88 dan bahawa jurunilai-jurunilai dan broker-broker pihak penentang mungkin tidak mengambil kira kesemua faktor-faktor yang berkaitan di dalam penilaian harta tersebut di mana mengakibatkan harta tersebut terlalu dinilai kurang.

I **Diputuskan**, menolak rayuan:

Isu yang dibangkitkan oleh perayu-perayu bahawa balu kepada si mati kedua tidak dijadikan salah satu pihak di dalam Saman Pemula

No 24–642–88 bukanlah satu alasan untuk melitigasi semula isu harga rizab tersebut. Dia, pada hakikatnya, bukanlah seorang benefisiari kepada si mati pertama dan dia telah memilih untuk tidak mencelah walaupun dia mempunyai pengetahuan terhadap perkara tersebut. Di dalam apa-apa kes sekalipun, oleh sebab A 15 k 6(1) Kaedah-Kaedah Mahkamah Tinggi 1980, ketakcantuman tersebut tidak memberi kesan kepada isu di hadapan mahkamah.

Tujuan sebenar permohonan adalah untuk melitigasi semula isu harga rizab harta tersebut, yang isunya telah dilitigasikan empat tahun terdahulunya. Ini telah dinyatakan dengan jelas sekali di dalam afidavit sokongan kepada permohonan tersebut. Oleh itu, ini adalah satu penyalahgunaan proses mahkamah (lihat ms 286I dan 287A–B).]

Notes

For cases on non-joinder of party, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3346–3350.

For a case on abuse of process of the court, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) para 370.

Legislation referred to

Rules of the High Court 1980 O 15 r 6(1)
Trustees Act 1949

Appeal from: Originating Summons No 24–580 of 1996 (High Court, Pulau Pinang)

Tan Beng Hong (*Tan Beng Hong & Co*) for the appellants.
Stella Lau Chow Ong (*Lim Kean Siew & Co*) for the respondents.

Shaik Daud JCA (delivering judgment of the court): This is an appeal against the decision of the Penang High Court which had, on 8 September 1997, dismissed an originating summons issued by the appellants. The appellants had filed an originating summons dated 6 July 1996 against the respondents seeking, inter alia, directions whether the appellants, as executors and trustees of the estate of Tye Kee Yoon @ Tai Hi Yoon, deceased, should or should not institute and prosecute an action against the respondents claiming damages for negligence and for breach of their fiduciary duties as executors and trustees of the said estate in relation to the sale of the property known as Holding No 448, Town Subdivision 4, Northern District Penang, together with all the buildings erected thereon and for all necessary and consequential directions thereon.

This matter, in fact, has a long and protracted history. The deceased, Tye Kee Yoon @ Tai Hi Yoon ('the first deceased), died in 1919 and proceedings in respect of the estate of the deceased began in 1956.

In 1988, the executors and trustees of the estate had issued Originating Summons No 24–642–88 to obtain consent of the court to sell the property of the estate. In that originating summons, the present respondents were

A plaintiffs and the second and third appellants were defendants No 17 and 18. Tai Kim Yuen, one of the beneficiaries of the deceased, had died in 1982 ('the second deceased'). He left a will in which he named his widow (the present first appellant) and two of his sons (second and third appellants respectively) as executors and trustees. His share of the estate of the first deceased was given to seven of his sons. All the seven sons of the
B second deceased had been named as defendants Nos 15, 16, 17, 18, 19, 20, 21 and 22.

Originating Summons No 24–642–88 had been personally served on all defendants and at the same time the court ordered that it be advertised in three major local newspapers with a request that any interested party could
C come forward and stake their claim.

On 14 July 1992, with the consent of all parties, the court gave an order of sale of the said property on a reserved price of RM9.5m. The auction of the said property was fixed on several occasions but on all occasions, there were no bidders. Finally, on the application of all the plaintiffs in the said originating summons, the court on 28 October 1993 ordered that the said
D property be sold by private treaty to Malaysia Vegetable Oil Refinery Sdn Bhd for RM 9.5m. It cannot be gainsaid that this order was given by the court after hearing counsel for all parties and after considering valuation reports tendered. The defendants appeared to have agreed with the order as they did not appeal.

E Then on 30 October 1993, one of the defendants ie defendant No 17 (who now is the second plaintiff), filed an application for an order that the court recall the 28 October 1993 order 'for the purpose of enabling the court to consider an alternative valuation report to be submitted by CH William, Talhar and Wong Sdn Bhd'. The court rejected this unusual application on 11 November 1993 and again there was no appeal.

F The sale of the said property was completed on 26 April 1994 and the court was informed that almost all the proceeds of sale had been distributed to all the beneficiaries. What remained to be distributed are the shares of those who disagreed. It must be borne in mind that by this time, 80 years had passed since the death of the first deceased.

G Some two years after the sale, on 6 July 1996, the present plaintiff filed this Originating Summons No 24–580–1996 claiming to be the executors and trustees for the second deceased. After a careful study, it can be seen that the present first plaintiff is the widow of the second deceased and she is not a beneficiary of the estate of the second deceased deriving from the estate of the first deceased. Second and third plaintiffs are in fact defendants
H Nos 17 and 18 in the Originating Summons No 24–642–88, and if it can be remembered, it was the third plaintiff (as defendant No 18 before) who applied to recall the 28 October 1993 order of sale by his application dated 30 October 1993, which application was dismissed, but he did not appeal against that dismissal.

I First and foremost, the present application appears to have been made under the Trustees Act 1949 and the Rules of the High Court 1980, but no where is it stated under which particular provision of the Trustees Act 1949

or the Rules of the High Court 1980 it is made. Learned counsel for the appellant conceded that the heading of the application which mentions the Trustees Act 1949 is in fact wrong. Secondly, the application is seeking a direction to institute proceedings against the respondents for damages for negligence and for breach of their fiduciary duties as executors and trustees of the estate of Tye Kee Yoon @ Tai Hi Yoon in relation 'to the sale of the property ...'. Read in its proper context, we agree that the application is nothing more than a challenge to the sale vis-a-vis the price at which the said property was sold. This is borne out by the affidavit in support of the application sworn by one Datuk Tai Tsu Kuang @ Tye Tsu Hong, the second appellant. At para 5 therein, he deposed that he verily believed the property is worth substantially more than the reserved price of RM9.5m and according to another independent firm of valuers, the said property is worth RM16.245m. At para 7 thereof, he deposed that it was his belief that the said property is substantially worth more than the reserved price from various articles and reports published in the news media during the relevant period. At para 8, he deposed that he began to express his deep concern to the respondents that their valuers and brokers M/s Jones Lang Wooton might not have taken all relevant factors into consideration in their valuation of the said property. At para 10, he deposed that he had consistently maintained that the said property had been grossly undervalued.

From all these averments, it cannot be denied that the actual purpose of the application was nothing more than a challenge to the reserved price of the said property. It cannot be said that the learned judge was wrong when he held that the actual purpose of the application was to challenge the reserved price of the said property. It cannot be gainsaid that on 14 July 1992, it was with the consent of all parties that the very same court had ordered the sale of the said property at the reserved price of RM9.5m. That, in fact, was not the one and only time the issue of the reserved price had come up before the court. It came up on two other occasions. On the second occasion on 28 October 1993, it was on the application of all the plaintiffs in the originating summons, the same court ordered the said property be sold by private treaty to Malaysian Vegetables Oil Refinery Sdn Bhd at the reserved price of RM9.5m. This was in fact made after the court had heard all parties. Two days later, on 30 October 1993, one of the defendants ie defendant No 17, who now is the second plaintiff, filed an application for an order that the court recall its 28 October 1993 order for the purpose of enabling the court to consider an alternative valuation report. After hearing all parties, the court dismissed the application. On all three occasions, no appeal was filed to challenge the value of the said property.

One of the issues brought up by the appellants is that the widow of the second deceased was not made a party in Originating Summons No 24–642–88. This is hardly a reason to relitigate the issue of the reserved price. She was, in fact, not a beneficiary of the first deceased and she chose not to intervene as she had knowledge of the matter. In any case, by virtue of O 15 r 6(1) of the Rules of the High Court 1980, the non-joinder has hardly affected the issue before the court.

A We agree with the learned judge that the actual purpose of the said application was to relitigate the issue of the reserved price of the said property which issue had been litigated by the court four years earlier. This is borne out very clearly by the affidavit in support of the application. Therefore, it is an abuse of the process of the court. We dismissed the appeal with costs and ordered the deposit to go towards account of taxed
B costs.

Appeal dismissed.

Reported by Mohd Rizal Abidin

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